

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF NEVADA

3 LAS VEGAS, NEVADA

4 In re: USA COMMERCIAL MORTGAGE) JANUARY 31, 2007
5 COMPANY,) E-Filed: 03/12/07
6 Debtor.) Case No.
7) BK-S-06-10725-LBR
8) Chapter 11

8 PARTIAL TRANSCRIPT OF PROCEEDINGS
9 OF
10 (06-10725) MOTION TO ENFORCE ORDER
11 GRANTING DEBTOR'S MOTION TO DISTRIBUTE FUNDS, 2350
12 AND

13 OMNIBUS OBJECTION TO CLAIM OF
14 IN THE AMOUNT OF CLAIMS ON EQUITY
15 MISFILED AS CREDITOR CLAIMS, NO. 2353
16 AND

17 OBJECTION TO CLAIM 79
18 OF PENSION BENEFIT GUARANTY CORPORATION
19 IN THE AMOUNT OF \$884,389,
20 CLAIM 80 OF PENSION BENEFIT GUARANTY CORPORATION
21 IN THE AMOUNT OF 1,068,233,4
22 AND CLAIM 81 OF PENSION BENEFIT GUARANTY CORPORATION,
23 NO. 2252

24 AND
25 OBJECTION TO CLAIM 83
OF PENSION BENEFIT GUARANTY CORPORATION
IN THE AMOUNT OF \$884,389,
CLAIM 84 OF PENSION BENEFIT GUARANTY CORPORATION
IN THE AMOUNT OF \$1,068,233,
AND CLAIM 85 OF PENSION BENEFIT GUARANTY CORPORATION,
NO. 2255

AND
APPLICATION FOR COMPENSATION, NO. 2316
AND

26 Proceedings recorded by electronic sound recording;
27 transcript produced by transcription service.

1 OMNIBUS OBJECTION TO CLAIM OF
2 IN THE AMOUNT OF MISFILED
3 AGAINST USA CAPITAL FIRST TRUST DEED FUND, LLC,
4 BY DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST
5 DATED 04/30/97, CLAIM NO. 43;
6 DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST
7 DATED 04/30/97, CLAIM NO. 44;
8 DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST
9 DATED 04/30/97, CLAIM NO. 45;
10 DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST
11 DATED 04/30/97, CLAIM NO. 46;
12 DANIEL O. CARLTON & TAKEKO CARLTON REVOCABLE TRUST
13 DATED 04/30/97, CLAIM NO. 49;
14 LAWRENCE J. ARONSON & HENRIETTA ARONSON, CLAIM NO. 50;
15 MOLLIE SHOICHET & HENRIETTA ARONSON, CLAIM NO. 51;
16 BUCKWALD REVOCABLE TRUST DATED 02/11/92, CLAIM NO. 52;
17 PHILLIP DARIN GOFORTH & FRANCESCA M. GOFORTH, CLAIM NO. 54;
18 MELINDA ESTEVEZ & RICHARD DAVID ESTEVEZ,
19 ACCT. NO. 2, CLAIM NO. 57;
20 MELINDA ESTEVEZ & RICHARD DAVID ESTEVEZ,
21 ACCT. NO. 1, CLAIM NO. 58;
22 MELINDA ESTEVEZ & RICHARD DAVID ESTEVEZ,
23 ACCT. NO. 3, CLAIM NO. 59;
24 THE EVO E. ZEPPONI AND BILLIE D. ZEPPONI FAMILY TRUST
25 UNDER AGREEMENT DATED 02/09/83, CLAIM NO. 60;
IONA PETE BAKAS HALLIDAY, CLAIM NO. 61;
LAUREN J. GILBERT & ERIN M. GILBERT, CLAIM NO. 62;
LAUREN J. GILBERT, CLAIM NO. 63;
MICHAEL W. CARLTON & HELEN I. CARLTON, CLAIM NO. 67;
SONDRA SKIPWORTH REVOCABLE TRUST DATED 11/28/01,
CLAIM NO. 74;
DONNOLO FAMILY TRUST DATED 08/24/88,
JOSEPH & LORETTA DONNOLO, TRUSTEES, CLAIM NO. 75;
RICHARD L. YOUNGE IRA, CLAIM NO. 76;
EDWIN C. HANSEN & RACHEL M. HANSEN, CLAIM NO. 78;
CENTER STATE BEVERAGE, INC., CLAIM NO. 79;
LAYNE FAMILY TRUST, BRUCE & SHERRY LAYNE, CLAIM NO. 81;
KAREN PETERSEN TYNDALL TRUST DATED 03/09/94, CLAIM NO. 86;
KPT IRREVOCABLE TRUST DATED 07/16/99, CLAIM NO. 87;
KPT IRREVOCABLE TRUST DATED 07/16/99, CLAIM NO. 88;
ROBERT CAROLLO AND BEVERLEY CAROLLO, CLAIM NO. 92;
ARNOLD ROSENTHAL, CLAIM NO. 93;
VICTORIA SMITH, CLAIM NO. 95;
L. KANANI COHUME, CLAIM NO. 101;
MICHAEL BAGINSKI, CLAIM NO. 113;
KAREN PETERSEN TYNDALL TRUST DATED 03/09/94, CLAIM NO. 116;
KPT IRREVOCABLE TRUST DATED 07/16/99, CLAIM NO. 117;
JAMES J. LEE, ESQ., CLAIM NO. 121;
JAMES J. LEE, CLAIM NO. 122;
WILLIAM CHAD BERRY, CLAIM NO. 126;

1 RDJ INVESTMENTS, CLAIM NO. 130;
2 RICHARD N. ANDERSON TTE,
3 RICHARD N. ANDERSON SEPARATE PROPERTY, CLAIM NO. 131;
4 CRAIG ZAGER SEP IRA, CLAIM NO. 132;
5 CURTIS R. & TERRI L. COLAGROSS, CLAIM NO. 139
6 NO. 2286
7 AND
8 OBJECTION TO CLAIM 120
9 OF STANDARD PROPERTY DEVELOPMENT, LLC,
10 IN THE AMOUNT OF, NO. 2299
11 AND
12 OMNIBUS OBJECTION TO CLAIM 115 OF BRIAN M. ADAMS
13 IN THE AMOUNT OF;
14 CLAIM 118 OF HERMAN M. ADAMS;
15 CLAIM 118 OF BRIAN ANTHONY G. ADAMS;
16 CLAIM 118 OF ANTHONY G. ADAMS OLYMPIA CAPITAL MANAGEMENT,
17 CLAIM 119;
18 KANTOR NEPHROLOGY CONSULTANTS, LTD, 401(K) PSP,
19 GARY KANTOR, TRUSTEE, CLAIM 123;
20 DR. GARY KANTOR, CLAIM 124;
21 LYNN M. KANTOR, CLAIM 125, NO. 2301
22 AND
23 MOTION FOR PROTECTIVE ORDER, NO. 2441
24 AND
25 OBJECTION TO CLAIM 819 OF SPECTRUM FINANCIAL
IN THE AMOUNT OF \$49,581
AND CLAIM 821 OF ROLLAND P. WEDDELL
IN THE AMOUNT OF \$13,081, NO. 2067
AND
ORDER SHORTENING TIME
RE: APPLICATION TO EMPLOY
DIAMOND, McCARTHY, TAYLOR, FINLEY & LEE, LLP,
AS SPECIAL LITIGATION COUNSEL APPLICATION
PURSUANT TO FEDERAL RULES OF BANKRUPTCY PROCEDURE 2014(A)
FOR ORDER UNDER SECTION 1103 OF THE BANKRUPTCY CODE
AUTHORIZING THE EMPLOYMENT AND RETENTION
OF DIAMOND, McCARTHY, TAYLOR, FINLEY & LEE, LLP,
AS SPECIAL LITIGATION COUNSEL
TO THE OFFICIAL UNSECURED CREDITORS COMMITTEE
FOR USA COMMERCIAL MORTGAGE COMPANY, NO. 2505
AND
HEARING RE: EMPLOYMENT APPLICATION EXTENSIONS (CONT.)
NO. 2402
AND
STATUS HEARING RE: INVOLUNTARY PETITION, NO. 8
AND
ORDER SHORTENING TIME
RE: MOTION TO ENFORCE AUTOMATIC STAY
TO PREVENT FORECLOSURE
BY WESTERN UNITED LIFE ASSURANCE COMPANY, NO. 2561

VOLUME 1
BEFORE THE HONORABLE LINDA B. RIEGLE
UNITED STATES BANKRUPTCY JUDGE

Wednesday, January 31, 2007

9:30 a.m.

Court Recorder: Joanne Lloyd

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

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1 (Court previously convened at 09:38:25 a.m.)

2 (Partial transcript at 09:43:56 a.m.)

3 THE COURT: Okay. All right. So let's leave the
4 first matter for a few minutes and go to the second matter.
5 That's the omnibus objection by Ms. Loraditch or did you
6 want to go in a separate order? I have no -- we can do that
7 one next, then, Mr. McGimsey?

8 MS. LORADITCH: Your Honor will recall at the last
9 hearing on this matter held January 3rd the Court requested
10 additional briefing on issues surrounding Bankruptcy Code
11 Section 510(b), and the parties filed those with the court
12 on January 17th.

13 As instructed, they were filed blind, and so, really,
14 it's the Court's preference if you want to hear from one or
15 the other first or we'll --

16 THE COURT: Why don't you respond, Mr. McGimsey,
17 first, and then I'll have Ms. Loraditch. Since they were
18 blind, you can, in essence, reply to each other's briefs.

19 MS. LORADITCH: Correct.

20 MR. MCGIMSEY: Okay. The first point I made,
21 your Honor, is that under the bankruptcy rules the attempt
22 to subordinate a claim requires an adversary proceeding.

23 The objection to the claim really is nothing more than
24 an attempt by the committee of equity holders to say that
25 our claim should be subordinated under Rule -- let me find

1 that rule -- 7001 of the Rules of Bankruptcy Procedures.

2 Matters that are to be brought by adversary proceedings
3 includes a proceeding to subordinate any allowed claim or
4 interest, except when a Chapter 9, Chapter 11, Chapter 12,
5 or Chapter 13 plan provides for subordination.

6 So our initial position is that this objection to claim
7 is really nothing more than an attempt to subordinate, and
8 that requires --

9 THE COURT: But how is your claim any different
10 than every one of the other equity holders?

11 MR. MCGIMSEY: How is my claim different?

12 THE COURT: Than every one of the equity holders.

13 MR. MCGIMSEY: I have filed a creditors claim.
14 The equity holders apparently don't think they have a
15 creditors claim. They were given notice. Well, they didn't
16 file creditors claims. Okay?

17 And, you know, that argument comes back to, you know,
18 the late-filed claims' argument in any case. If they didn't
19 file a claim on time, then they don't get paid in accordance
20 with people who filed claims on time. I mean, that's the
21 standard procedure.

22 If a creditor wants to file a late claim, wants
23 permission to be allowed to file a late claim, he files.
24 That creditor files an application, and it shows under
25 Rule 60 why he should get the relief.

1 We don't have that in front of us, your Honor. That's
2 not a question that's in front of you. There's no equity
3 holder in a similar situation to my clients who has asked
4 this Court to be allowed now to file a late claim.

5 I don't know that they should be allowed to file a late
6 claim. If they didn't file a late claim or if they didn't
7 file a claim, then that's their problem. You know, we filed
8 a claim. We had a claim.

9 And that's one of the important provisions, and I think
10 the legislative history that I have referred to in my points
11 and authorities and the cases that I have referred to and
12 even the cases that the committee has cited indicate that
13 people in a position of my clients do, in fact -- assuming
14 they prove it, and no one's really objected to it -- do, in
15 fact, have a creditors claim.

16 The reason for the mandatory subordination provisions
17 provided in 510(b) arose out of the fact that equity holders
18 could, in fact, have a creditors claim in a bankruptcy.

19 THE COURT: Well, if you hadn't bought the stock,
20 you wouldn't have a claim.

21 MR. MCGIMSEY: I'm not saying that it didn't arise
22 out of the purchase or sale of a security, but that isn't
23 the question. The question is do I have a claim.

24 And prior to the enactment of 510(b), you know, in
25 fact, people who bought stock in a corporation and had

1 either rescinded or had rescissionary rights to get their
2 money back were treated on a par with other unsecured
3 creditors.

4 The Law Review article cited in the cases and,
5 actually, in the legislative history prior to the enactment
6 of the mandatory subordination provisions showed that.

7 It said, you know, we don't think it's fair that
8 someone who, you know, has purchased an equity interest in
9 the corporation and, therefore, expected to share in profits
10 ought to be treated on a par with general unsecured
11 creditors who were just looking to be repaid and were not
12 looking for a share in the profits. But prior to the
13 passage of this statute -- and I think it was '77, 1977 or
14 1978 -- that was exactly the case.

15 And in the legislative history even -- and I have
16 quoted that and attached it to my points and authorities --
17 the SEC took the position that, in fact, a stockholder who
18 had been defrauded by the corporation and had a claim for
19 damages ought, in fact, to be treated on a par with other
20 unsecured general creditors.

21 Congress decided otherwise, but they didn't say that
22 that was not a claim because it is a claim. It's a claim
23 for damages.

24 What they said was that that claim should be
25 subordinated to general unsecured creditors. No general

1 unsecured creditor has asked that our claim be subordinated.

2 And all of the cases essentially cited by the
3 Diversified Trust Fund dealt with the question of whether or
4 not a claim for damages arose out of the purchase and sale
5 of a security.

6 In fact, probably, the best case from my standpoint,
7 the best language, is a Nevada case, the American Wagering
8 case, in which the Nevada Court and the Bankruptcy Appellate
9 Panel for the Ninth Circuit dealt with the issue.

10 And they decided on behalf of creditors that
11 Mr. Racusen (phonetic) should be subordinated to general,
12 not secured creditors, but to general creditors because his
13 obligation arose out of the purchase and sale of a security.

14 And in that case, they specifically stated that 510(b)
15 was not meant to protect or for the benefit of equity
16 holders.

17 And so, you know, it appears to me, your Honor, that
18 your concern is that these other equity holders are in the
19 same position as my clients, but they're not in the same
20 position as my clients because they didn't file a proof of
21 claim.

22 THE COURT: But they are, but for the fact that
23 they didn't file a proof of claim because they perceived the
24 law to be different.

25 MR. MCGIMSEY: Well --

1 THE COURT: So if I --

2 MR. McGIMSEY: -- I don't think --

3 THE COURT: It seems to me there is a
4 mistake-at-law issue here. If I open it up again which I
5 could do and deem that everybody filed, you'd be in the
6 exact same spot, right?

7 MR. McGIMSEY: I don't think that you can do that,
8 your Honor. I mean, you can do that. I think you have to
9 have -- I think that the Constitution requires that you have
10 a case in controversy in front of you. That someone bring
11 it to you, and then under the law they have to show good
12 reason why they didn't file a claim.

13 I don't there's a -- why is there a mistake in law? I
14 don't see a mistake in law. It was clear to me, you know.
15 I mean, we got a creditors claim. We filed a creditors
16 claim. We got a notice that said --

17 THE COURT: But your injury is the exact same
18 injury that everybody else suffered here. Your alleged
19 injury is that notwithstanding the fact they said we're
20 going to invest in First Trust Deed Funds they didn't invest
21 in First Trust Deed Funds.

22 Notwithstanding the fact they said we're going to pay
23 the money only back to the fund and dividend it out, they
24 didn't do that. It's exactly like everybody else's, right?

25 MR. McGIMSEY: Well, that's the same thing for any

1 late-filed claims, your Honor. We have a whole slew of law
2 on late-filed claims.

3 And somebody's got to come in and say I want to file a
4 late-filed claim. There's no such thing as a class claim,
5 you know. They can't come in, and I don't believe --

6 THE COURT: Right.

7 MR. MCGIMSEY: -- that --

8 THE COURT: But late-filed claims are allowed in a
9 Chapter 11 where there's an excuse and where there's been no
10 harm.

11 MR. MCGIMSEY: I don't see that in front of you.

12 THE COURT: I mean, you just want your clients --
13 and rightfully so. You want your clients to get paid more
14 than everybody else who's in exactly the same position that
15 they're in.

16 MR. MCGIMSEY: Well, they're not in exactly the
17 same position as I am. They chose not to file --

18 THE COURT: The only reason --

19 MR. MCGIMSEY: -- a proof --

20 THE COURT: -- they're not --

21 MR. MCGIMSEY: -- of claim.

22 THE COURT: -- is a procedural technicality,
23 right?

24 MR. MCGIMSEY: Yeah. That's the same for any
25 late-filed claim, your Honor, isn't it? Is there any

1 difference between any late-filed claim? Just, you know, I,
2 hey --

3 THE COURT: Yeah. Because you don't have to file
4 a claim if you're listed. These people were listed.

5 MR. MCGIMSEY: They were not listed as creditors.

6 THE COURT: Well, they're listed as equity
7 holders.

8 MR. MCGIMSEY: Well, that's fine, and they were
9 satisfied --

10 THE COURT: Under your theory, though, every one
11 of them is a creditor because there was -- under your
12 theory, every one of them was automatically a creditor
13 because the management didn't do what they said they were
14 going to do.

15 MR. MCGIMSEY: No. I don't know that. I haven't
16 talked to every one of them. I've only talked to my
17 clients. You know, I don't represent them.

18 THE COURT: Well, but you don't have any
19 particularized claim. You don't have any -- your claim is
20 merely -- and "merely" is the wrong word.

21 You don't have any specific instance where they said
22 I'm going to do something for you and not for everybody
23 else. All you have is the agreements to rely on, right?

24 MR. MCGIMSEY: Um-h'm.

25 THE COURT: All you have to rely on are the

1 instruments that form the investment.

2 MR. MCGIMSEY: Basically.

3 THE COURT: Okay. That's what everybody else has
4 got.

5 MR. MCGIMSEY: They should have filed claims,
6 your Honor. You know, I mean, it's easy to say to all of us
7 it's not fair for you to get paid ahead of other people just
8 because you obeyed the rules, just because you took notice
9 of the deadlines and filed a proof of claim.

10 Well, and I still think you have to have it in front of
11 you, your Honor. I think you have to have somebody say I
12 want to file a late claim.

13 The committee can't do that. They don't represent
14 these people. There's no such thing as a class claim, and
15 then I think if someone wants to file a late claim, you
16 know, there has to be more to it just than --

17 THE COURT: Well, why --

18 MR. MCGIMSEY: -- oh, I didn't --

19 THE COURT: -- couldn't the debtor just reschedule
20 the (indiscernible) creditors claims, then, under that
21 theory? If your theory is correct, they just reschedule
22 them as creditors claims, right?

23 MR. MCGIMSEY: I don't know if they can
24 reschedule. I don't know if the debtor can reschedule them
25 as creditors claims.

1 But I assume if they reschedule them as creditors
2 claims, we'd have to go through the confirmation process
3 again.

4 THE COURT: Okay. All right. Response.

5 MS. LORADITCH: I think your Honor has really hit
6 upon the core issue, and that is that none of these fund
7 members have alleged any damage whatsoever that they have
8 suffered that is unique to them, that is unique to their
9 respective individual equity interests.

10 And as our supplemental brief went into great detail
11 about, these fund members are subject to 510(b) with respect
12 to their claim, their damage claims.

13 They arise from the purchase of a debtor's security.
14 Those damages are to be subordinated to all interests that
15 are senior to or equal to the interest represented by that
16 security. The only exception in that statute is the common
17 stock and no other security. That is not what we have here.

18 What these fund members are trying to do, in essence,
19 is turn 510(b), the absolute-priority rule, the other
20 provisions of the bankruptcy code, and controlling law in
21 this jurisdiction on its head.

22 Section 510(b) prevents these fund members from
23 circumventing the priority scheme established by the
24 bankruptcy code. 510(b) mandates that they recover the
25 equity level on a pro rata basis.

1 They are attempting to be treated as creditors. They
2 say that, well, you know, we can just be subordinated behind
3 all other general unsecured creditors.

4 But the fact is they know there are no other general
5 unsecured creditors. So, in effect, they're asking to be
6 paid ahead of all of their other fund members that as the
7 Court said are in exactly the same position.

8 The only other thing I would point out, your Honor,
9 unless you have specific questions for me is that these
10 claims that are being asserted are against Diversified Fund
11 when as we said in our brief they're really derivative
12 actions if that's what they're trying to seek, and they're
13 going against the wrong entity.

14 Diversified Fund is owned by these fund members and all
15 other 1300-and-some-odd fund members, and so any damage that
16 was suffered by the company as a whole was suffered by all
17 the company's equity holders on a pro rata basis.

18 Those actions belong to the company itself. And
19 although they're allowed to bring those claims derivatively
20 on the company's behalf, they belong to the company, and
21 anything that they recover on behalf of the company belongs
22 to the company. So in any event, they would recover and
23 have to share along with all the other Diversified Fund
24 members.

25 So I think that's the recurring theme here is that

1 these fund members must recover on a pro rata basis, and
2 they are not to be permitted to go outside the statutory
3 scheme for the priority of distributions.

4 Did the Court have any other questions for me?

5 THE COURT: No. Thank you.

6 MS. LORADITCH: Thank you.

7 THE COURT: Okay. Ms. Jarvis, did you have a
8 comment?

9 MS. JARVIS: The debtors did file a joinder in
10 these objections. And one other fact I just would like to
11 point out to the Court that is relevant to this, these fund
12 members were sent proofs of interest where we listed their
13 interest and told that they did not have to file even the
14 proofs of interest if they agreed with what was on the
15 schedules.

16 So, you know, the members were led to believe correctly
17 that they had equity-interest claims, and, therefore, those
18 that filed creditors claims that are really no different
19 than these equity claims should be treated as equity claims
20 under 510(b).

21 That is the correct result under the law and also is
22 the correct result given the notice that was given to the
23 parties in this case, in the --

24 THE COURT: Okay.

25 MS. JARVIS: -- Diversified case.

1 MR. MCGIMSEY: I appreciate Ms. Jarvis' comments;
2 however, my clients received a notice to file a proof of
3 interest, and they also received a notice to file a proof of
4 claim if they had a creditors claim.

5 Is that correct?

6 MS. JARVIS: Everyone received proofs of claim.
7 Everyone received --

8 MR. MCGIMSEY: I was --

9 MS. JARVIS: -- (indiscernible).

10 MR. MCGIMSEY: We received a notice.

11 MS. JARVIS: Everybody --

12 MR. MCGIMSEY: They gave us --

13 MS. JARVIS: -- (indiscernible).

14 MR. MCGIMSEY: -- a deadline to file a proof of
15 claim and a proof of interest, so, I mean, everyone was
16 given notice to file a proof of claim.

17 The argument -- and I won't belabor what I've already
18 stated, your Honor, but the argument that somehow our claim
19 for damages against the Diversified Trust Fund belongs to
20 the Diversified Trust Fund is just circular. It makes no
21 sense at all.

22 And, in addition, if your Honor will look at the
23 congressional history, the legislative history, which I
24 cited to and actually attached to my points and authorities,
25 in that legislative history, it did not indicate that a

1 creditors claim such as mine would be paid on a pro rata
2 basis with other equity holders. In fact, it said -- and it
3 talked about a subordinated debenture -- that it would be
4 paid ahead of equity holders.

5 THE COURT: Okay. Well, I'm going to sustain the
6 Funds' objections. 510(b) says, "For purpose of
7 distribution under this title, a claim arising from" --
8 let's see.

9 "A claim for damages arising from the purchase or sale
10 of such a security shall be subordinated to all claims or
11 interests that are senior to or equal to the claim or
12 interest represented of a said security, except if it's
13 common stock."

14 You know, there's no need to go to the legislative
15 history because it's clear. It says arising from the
16 purchase or sale.

17 The only reason they have a claim is because they
18 bought the security, and management didn't do what it's
19 supposed to do.

20 And the problem with this -- a distinction will be
21 made. Let's assume that, coincidentally, these people sold
22 goods and services to the debtor. Well, they'd have a
23 creditors claim for that because it's a different level.

24 I just can't fathom the concept that these creditors
25 could claim a creditors claim for the exact same injury that

1 everybody else has.

2 And under that theory, they would get their claim paid
3 in full, and I don't know what the amount of the claim would
4 be. I guess the amount of the claim would be everything
5 they put in the investment.

6 And then everybody else who suffered the exact same
7 kind of injury and damage would then have to share pro rata
8 after what's left. That just turns the concept of
9 bankruptcy upside down. I agree.

10 And if it were the other way, trust me, I would just
11 allow everybody else to claim to be treated as a creditors
12 claim.

13 There's absolutely no reason for disparate treatment,
14 and that would, in essence, have created an unequal
15 classification, so it was an interesting theory, but I don't
16 agree with it, so --

17 MR. MCGIMSEY: Well, can I ask you exactly what
18 you've done, your Honor? Have you said I have no claim?

19 THE COURT: No. I said you have a claim as an
20 equity holder.

21 MR. MCGIMSEY: Well, do you say I have no --

22 THE COURT: Well, no.

23 MR. MCGIMSEY: I --

24 THE COURT: You may have a claim, but it's going
25 to be treated equally.

1 MR. MCGIMSEY: So you are subordinating my claim.

2 THE COURT: It's going to be treated equally to
3 all other claims, the equity claims, in the same interest.

4 MR. MCGIMSEY: So I'm being subordinated; is that
5 correct?

6 THE COURT: You're going to be treated like
7 everybody else. You're going to be treated exactly in
8 accordance with what everybody else is being treated.

9 MR. MCGIMSEY: So --

10 THE COURT: It's not subordinated.

11 MR. MCGIMSEY: Well, then --

12 THE COURT: You're asking --

13 MR. MCGIMSEY: You're --

14 THE COURT: -- to be elevated. You're asking to
15 be elevated. That's what you were asking to do.

16 MR. MCGIMSEY: I'm not asking to be elevated.

17 THE COURT: You were.

18 MR. MCGIMSEY: I'm not asking --

19 THE COURT: But you were saying --

20 MR. MCGIMSEY: -- to be elevated.

21 THE COURT: -- by filing that you were saying I'm
22 going to categorize my equity interest different by filing a
23 creditors claim; ergo, I am being elevated, so it's not that
24 you're being subordinated. You're being treated exactly
25 what you're supposed to be.

1 Oh, and in the 7001, I think only a -- it says, "Except
2 as provided in a Chapter 11 plan." I think 7001 only
3 applies when you're seeking subordination, equitable
4 subordination, the bad-conduct kinds of equitable
5 subordination, as opposed to looking at what the nature has,
6 so I just disagree.

7 I mean, it's an interesting argument. I just disagree
8 so, you know, your claim will be treated like everybody
9 else's.

10 MR. MCGIMSEY: Well, I don't understand that. My
11 claim has been -- they filed an objection to the claim, and
12 I would just like it clear, your Honor --

13 THE COURT: Yeah.

14 MR. MCGIMSEY: -- you were saying that 510(b) says
15 I don't have a claim.

16 THE COURT: No. It says that it's to be -- well,
17 it says that it was subordinated, but I think in this case
18 it's senior to or equal, or equal.

19 MR. MCGIMSEY: No one's claimed these --

20 THE COURT: What are your damages? Your damages
21 are exactly what you put in, right?

22 MR. MCGIMSEY: Exactly.

23 THE COURT: Okay.

24 MR. MCGIMSEY: That I haven't --

25 THE COURT: So why --

1 MR. MCGIMSEY: -- gotten back.

2 THE COURT: -- should your clients be paid their
3 25,000, 50,000, whatever it is and in full before everybody
4 else gets their share or, more importantly, they have to
5 share it pro rata? That's what you're asking.

6 MR. MCGIMSEY: I'm asking that because we --

7 THE COURT: And I'm saying no. I'm saying that's
8 not the law.

9 MR. MCGIMSEY: So these people -- anybody can file
10 a late claim. We no longer have a --

11 THE COURT: That has nothing to do with it.

12 MR. MCGIMSEY: We no longer have a late claim --

13 THE COURT: It's not a creditors claim.

14 MR. MCGIMSEY: So that is what I wanted you to
15 say, your Honor.

16 THE COURT: Okay. It's not --

17 MR. MCGIMSEY: That's what I want --

18 THE COURT: -- a creditors claim.

19 MR. MCGIMSEY: -- to hear. I don't have a
20 creditors claim.

21 THE COURT: As a creditors claim. Okay.

22 MS. LORADITCH: I'm sorry, your Honor. If I could
23 just clean up a couple of things? This issue came up at the
24 last hearing, and the Court had continued the committee's
25 objection to all of the --

1 THE COURT: Right.

2 MS. LORADITCH: -- claims on equity --

3 THE COURT: So I'll sustain --

4 MS. LORADITCH: -- or misfiled as creditors

5 claims, and so I just wanted to make sure we were having the
6 correct order on the record that the creditor claims were
7 disallowed because those fund members are going to recover
8 from the fund pursuant to their equity interest.

9 THE COURT: Correct.

10 MS. LORADITCH: And I believe there were -- I
11 don't if Mr. Greene is --

12 THE COURT: He is back there.

13 MS. LORADITCH: -- here today. He had also asked
14 that his particular claim be continued, and I believe
15 counsel for Ms. Tyndall is on the phone.

16 And we had filed a declaration -- or not we, but
17 Mesirow Financial had filed a declaration yesterday
18 indicating that some of Ms. Tyndall's claims were, in fact,
19 arising from her investments as a direct lender, although
20 she is also a Diversified --

21 THE COURT: Well, let's do --

22 MS. LORADITCH: -- Fund --

23 THE COURT: -- one thing at a time first, okay,
24 while Mr. Greene's here.

25 MS. LORADITCH: Yeah.

1 THE COURT: You don't disagree as to --

2 MR. GREENE: Good morning, your Honor.

3 James Greene for John Godfrey. Mr. Godfrey has filed a
4 proof of claim. My understanding of the law was
5 consistent --

6 THE COURT RECORDER: I'm sorry, Counsel. Could
7 you move the microphone a little bit closer to you?

8 MR. GREENE: Oh, sure.

9 THE COURT RECORDER: Thank you.

10 MR. GREENE: My understanding of the law was
11 consistent with the Court's, although I think Mr. McGimsey
12 made an interesting argument.

13 So we wanted to continue the objection on ours, but we
14 would agree that based on the Court's ruling his claim would
15 be treated as a proof of interest.

16 THE COURT: Okay. And if you prefer, I'll just do
17 it based upon that ruling. So if you want, so that you're
18 not giving up anything, I'll sustain their objection, so
19 that --

20 MR. GREENE: That's fine, your Honor.

21 THE COURT: Okay.

22 MR. GREENE: And we'll just put that in the order.

23 (Thereupon, the portion requested to be transcribed
24 was concluded at 10:09:04 a.m.)

25

1 I certify that the foregoing is a correct transcript
2 from the electronic sound recording of the proceedings in
3 the above-entitled matter.

4
5
6 /s/ Lisa L. Cline

03/12/07

7 Lisa L. Cline, Transcriptionist

Date